



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 11, 1998

Mr. Kenneth R. Yarbrough
Chief of Police
Richardson Police Department
P.O. Box 831078
Richardson, Texas 75083-1078

OR98-0676

Dear Mr. Yarbrough:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113077.

The Richardson Police Department (the "department") received a request for the opportunity to review and copy "all files, records and any other documents in the possession of the Richardson Police Department pertaining to the arrest, investigation, incarceration, and prosecution of one Joseph Roland Lave and any other documents in the possession of the Richardson Police Department relating to the arrest, investigation, incarceration, and prosecution of Mr. Lave's co-defendant, Timothy Bates" Both individuals referenced in the request have been convicted of a murder committed in 1992 and currently are incarcerated. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor appears to be an attorney for one or both of the individuals whose records are the subject of the request. Section 552.028 of the Government Code provides:

(a) A governmental body is not required to accept or comply with a request for information from an individual who is imprisoned or confined in a correctional facility.

(b) Subsection (a) does not prohibit a governmental body from disclosing to an individual described by that subsection information held by a governmental body pertaining to that individual.

(c) In this section, "correctional facility" has the meaning assigned by Section 1.07(a), Penal Code.¹

Gov't Code § 552.028 (footnote added).

By enacting section 552.028, the legislature intended to prevent inmates from using information obtained through the Open Records Act "to file bogus income tax returns on correctional officers, harass nurses at their home addresses, and send mail to the homes of Texas Department of Criminal Justice employees." Tex. Sen. Criminal Justice Comm., Bill Analysis, Tex. H.B. 949, 74th Leg., R.S. (1995) (quoting from "Background") (available through the Senate Research Center). After careful consideration and given the stated purpose of section 552.028, we do not believe that the legislature intended to prevent an attorney, who is subject to rules of professional responsibility, from requesting information on behalf of an inmate whom he is representing. Thus, we conclude that section 552.028 does not relieve a governmental body of its obligation to accept and comply with an open records request from an attorney who is representing an inmate. Accordingly, we will proceed to address the exceptions you raise.

Initially, we note that a governmental body is not expected to produce information which does not exist nor does it require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 362 (1983). Consequently, to the extent that you do not possess the documents sought in items 5, 6, 8, 10 or 11, you do not have to respond to those particular requests.

However, we next consider the application of section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information:

¹Section 1.07(a)(14) of the Penal Code provides:

"Correctional facility" means a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense. The term includes:

(A) a municipal or county jail;

(B) a confinement facility operated by the Texas Department of Criminal Justice;

(C) a confinement facility operated under contract with any division of the Texas Department of Criminal Justice; and

(D) a community corrections facility operated by a community supervision and corrections department.

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Therefore, the governmental body must meet both prongs of this test for information to be excepted under 552.103(a). We have reviewed the documents responsive to items 1, 2, 3, 4 and 7. You note that the postconviction remedies of the one sentenced to death typically extend eight to fifteen years and proceed to state that "even if state appellate remedies have (arguendo) been exhausted, federal attack on the conviction has not." However, the governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) is applicable in a particular situation. You have not provided any specific information concerning pending or reasonably anticipated litigation. Consequently, section 552.103 is not met with respect to documents responsive to items 1, 2, 3, 4, and 7. Accordingly, the documents pertaining to items 1, 2, 3, 4, and 7 may not be withheld under 552.103.

Next, we examine section 552.108 of the Government Code which reads as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you have not stated that the requested information pertains to a pending criminal investigation or prosecution so as to demonstrate that its release would interfere with the detection, investigation, or prosecution of crime. Nor have you demonstrated that the requested information relates to a criminal investigation that concluded in a result other than a conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2),

(b)(2). You must therefore release the requested information responsive to items 1, 2, 3, and 4 in their entirety. However, we have reviewed the documents involving the Langston file responsive to item 7 which pertain to an internal investigation into the death of James Langston. We agree that section 552.108(a)(2) applies in this instance as it concerns the detection, investigation, or prosecution of crime in an investigation that did not result in conviction or deferred adjudication. We note that you include with the materials an Agreed Order which appears to have been filed with the court. Consequently, it has become a public record and now may not be withheld from required public disclosure. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, either constitutional, statutory or by judicial decision. Section 143.089 of the Local Government Code provides for the maintenance of a police civil service file and provides what may be kept in that file:

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

- (1) the disciplinary action was taken without just cause; or
- (2) the charge of misconduct was not supported by sufficient evidence.

Information that section 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in a police department's internal file, as provided in section 143.089(g):

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

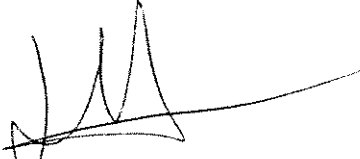
The court in *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), addressed the availability of information that is contained in a fire or police department's internal file pursuant to section 143.089(g). The court determined that section 143.089(g) makes confidential any records kept in a department's internal file.

No such confidentiality provision governs information that is maintained in the civil service file pursuant to section 143.089(a). Information maintained in the civil service files must generally be released to the public upon request, unless some provision of chapter 552 of the Government Code permits the civil service commission to withhold the information. Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 (1990) at 6 (construction of Local Gov't Code § 143.089(f) provision requiring release of information as required by law).

In a telephone conversation with city personnel, it was revealed that the city is a civil service municipality. You have not submitted to this office for review any of the personnel files maintained in either the confidential internal file or in the public civil service file. The public civil service file is public. We thus assume that those files have been provided to the requestor. Ordinarily, documents maintained only in the department's internal file pursuant to section 143.089(g) must be maintained as confidential. You also raise Government Code section 552.102 for the requested personnel files. However, these documents were not provided to this office for review. Accordingly, we cannot apply section 143.089(g) or Government Code section 552.102 to the documents at issue.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', with a long horizontal flourish extending to the right.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 113077

Enclosures: Submitted document

cc: Mr. Joseph F. Zellmer
Attorney at Law
620 W. Hickory Street
Denton, Texas 76201
(w/o enclosures)